

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 12, 2023

SEAN F. MCAVOY, CLERK

THELMA A.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,<sup>2</sup>

Defendant.

No. 2:20-CV-00386-ACE

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

ECF Nos. 24, 33

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 24, 33. Attorney Christopher H. Dellert represents Thelma A. (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

<sup>2</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

## JURISDICTION

Plaintiff protectively filed an application for Disability Insurance Benefits and Supplemental Security Income on December 22, 2017, alleging an amended disability onset date of December 22, 2017. Tr. 16, 89, 240-52. The applications were denied initially and upon reconsideration. Tr. 153-70, 173-86. Administrative Law Judge (ALJ) Glenn G. Meyers held a hearing on February 4, 2020, Tr. 38-88, and issued a partially favorable decision on February 26, 2020. Tr. 12-37. Plaintiff requested review by the Appeals Council and the Appeals Council denied the request for review on August 25, 2020. Tr. 1-6. The ALJ's February 26, 2020 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on October 20, 2020. ECF No. 1.

## STANDARD OF REVIEW

The ALJ is tasked with "determining credibility, resolving conflicts in medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or

1 if conflicting evidence supports a finding of either disability or non-disability, the  
 2 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230  
 3 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be  
 4 set aside if the proper legal standards were not applied in weighing the evidence  
 5 and making the decision. *Browner v. Sec'y of Health and Human Servs.*, 839 F.2d  
 6 432, 433 (9th Cir. 1988).

### 7 SEQUENTIAL EVALUATION PROCESS

8 The Commissioner has established a five-step sequential evaluation process  
 9 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a),  
 10 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through  
 11 four the claimant bears the burden of establishing a prima facie case of disability.  
 12 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes  
 13 that a physical or mental impairment prevents the claimant from engaging in past  
 14 relevant work. 20 C.F.R. § 404.1520(a)(4), 416.920(a)(4). If a claimant cannot  
 15 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to  
 16 the Commissioner to show (1) that Plaintiff can perform other substantial gainful  
 17 activity and (2) that a significant number of jobs exist in the national economy  
 18 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir.  
 19 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot  
 20 make an adjustment to other work in the national economy, the claimant will be  
 21 found disabled. 20 C.F.R. § 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 22 ADMINISTRATIVE FINDINGS

23 On February 26, 2020 the ALJ issued a decision finding Plaintiff was not  
 24 disabled as defined in the Social Security Act from the alleged onset date of  
 25 disability through November 19, 2019, but that she became disabled on November  
 26 20, 2019. Tr. 12-37.

1 At step one, the ALJ found Plaintiff, who meets the insured status  
2 requirements of the Social Security Act through December 31, 2022, had not  
3 engaged in substantial gainful activity since her alleged onset date. Tr. 18.

4 At step two, the ALJ determined Plaintiff had the following severe  
5 impairments: diabetes; obesity; fibromyalgia; lumbar degenerative disc disease; a  
6 depressive disorder; and an anxiety disorder. Tr. 19.

7 At step three, the ALJ found Plaintiff did not have an impairment or  
8 combination of impairments that met or medically equaled the severity of one of  
9 the listed impairments. Tr. 20.

10 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
11 that prior to November 20, 2019 she could perform light work, with the following  
12 nonexertional limitations:

13 [Plaintiff] required a sit/stand option in the workplace. She could  
14 perform frequent reaching, handling and fingering. She could  
15 occasionally stoop and crouch. She could never crawl, kneel, or climb  
16 ramps, stairs, ropes, ladders, or scaffolds. She could never work at  
17 heights, balance, drive, ambulate across uneven surfaces, or work in  
18 proximity to hazardous conditions. She had to avoid moderate  
19 exposure to chemicals, dust and smoke in the workplace. She was  
20 capable of engaging in unskilled, repetitive, routine tasks in two-hour  
21 increments. She would be absent from work six days per year.

22 Tr. 21.

23 At step four, the ALJ found that from December 22, 2017 to November 19,  
24 2019, Plaintiff was able to perform past relevant work as a cashier. Tr. 30.

25 At step five, the ALJ made an alternate finding that, based on the testimony  
26 of the vocational expert, and considering Plaintiff's age, education, work  
27 experience, and RFC, from December 22, 2017 to November 19, 2019 Plaintiff  
28 could also perform jobs that existed in significant numbers in the national

1 economy, including the jobs of marker, assembler of small products I, as well as  
2 inspector and hand packager. Tr. 30-31.

3 The ALJ found that beginning November 20, 2019 Plaintiff was limited to  
4 sedentary level exertion, with the same nonexertional limitations described in the  
5 RFC above; and that therefore, beginning November 20, 2019, a finding of  
6 disabled was directed by Medical-Vocational Rule 201.14. Tr. 29, 32.

7 The ALJ thus concluded Plaintiff was not under a disability within the  
8 meaning of the Social Security Act at any time from at any time from the alleged  
9 onset date until November 20, 2019, and that she became disabled on November  
10 20, 2019. Tr. 32.

### 11 ISSUES

12 Plaintiff seeks judicial review of the Commissioner's final decision denying  
13 her disability insurance benefits under Title II of the Social Security Act. The  
14 question presented is whether substantial evidence supports the ALJ's decision  
15 denying benefits and, if so, whether that decision is based on proper legal  
16 standards. Plaintiff raises the following issues for review:<sup>3</sup> (1) whether the ALJ  
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18 <sup>3</sup> Plaintiff also initially raised the issue of whether the ALJ's decision was  
19 Constitutionally defective because the ALJ and Appeals Council derived authority  
20 from a Commissioner whose appointment and tenure were unconstitutional (due to  
21 a removal provision that violated separation of powers principles). ECF No. 24 at  
22 2. The Ninth Circuit recently addressed the issue, severing the unconstitutional  
23 clause at issue, determining that there was no reason to regard any of the actions  
24 taken by the agency as void, and holding that unless a claimant demonstrates actual  
25 harm the unconstitutional provision has no effect on her case. *Kaufmann v.*  
26 *Kijakazi*, No. 21-35344, 2022 WL 1233238, at \*2, 4-6 (9th Cir. Apr. 27, 2022).  
27 Plaintiff subsequently filed an unopposed motion to strike the issue, ECF No. 36,  
28 which was granted by the Undersigned on June 27, 2022. ECF No. 38.

1 erred in setting Plaintiff's onset date of disability without input from a medical  
 2 source; (2) whether the ALJ properly evaluated Plaintiff's symptom complaints;  
 3 and (3) whether the ALJ erred in failing to clarify what a Sit-Stand Option  
 4 entailed.<sup>4</sup> ECF No. 24 at 2, 8-11.

## 5 DISCUSSION

### 6 A. Onset of Disability Date

7 Plaintiff alleges the ALJ erred in setting Plaintiff's onset date of disability  
 8 without input from a medical source. ECF No. 25 at 5-13. An ALJ may, but is not  
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10 <sup>4</sup> Under the heading "Issues" in her brief, Plaintiff's indicates an issue  
 11 before the Court is whether the ALJ erred "in his weighing of the medical opinion  
 12 evidence relating to Plaintiff's physical impairments." ECF No. 24 at 2. However,  
 13 within the brief, the corresponding argument is labeled and consists of argument  
 14 that the ALJ erred in failing to clarify what a sit-stand option entailed, with  
 15 discussion of Plaintiff's RFC and vocational expert testimony at step four and five.  
 16 ECF No. 24 at 8-11. There is limited discussion of the medical opinion evidence.  
 17 *Id.* The Court ordinarily will not consider matters on appeal that are not  
 18 specifically and distinctly argued in an appellant's opening brief. *See Carmickle v.*  
 19 *Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). Rather, the  
 20 Court will "review only issues which are argued specifically and distinctly."  
 21 *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.  
 22 2003) (quoting *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.  
 23 1994)). As Plaintiff makes no specific argument concerning any weight given to  
 24 the medical opinion evidence, the Court declines to consider this issue. As  
 25 Plaintiff has made an argument concerning the sit-stand option, the Court will  
 26 consider it, but notes the discrepancy between the Issues and Argument sections of  
 27 Plaintiff's brief and urges care in making sure the issues raised are clear to the  
 28 Court.

1 required to, call upon the services of a medical expert (ME) to assist with inferring  
2 the date that the claimant first met the statutory definition of disability. SSR 81-  
3 1p, 2018 WL 4945639, at \*1 (effective October 2, 2018). “The date that the  
4 claimant first met the statutory definition of disability must be supported by the  
5 medical and other evidence and be consistent with the nature of the impairment(s).  
6 SSR 81-1p, at \*5; 20 C.F.R §§ 404.1513, 416.913 (categories of evidence  
7 considered).

8 Here, the ALJ found that as of November 20, 2019 Plaintiff was limited to  
9 sedentary exertion, and that she was therefore disabled under the medical-  
10 vocational guidelines as of that date. Tr. 32. The ALJ based the onset date of  
11 disability on the January 20, 2020 opinion of Plaintiff’s provider, Ben Murrell, PA-  
12 C, which limited Plaintiff to sedentary level exertion. Tr. 29 (citing Tr. 732-35).  
13 The ALJ found that the limitations determined by Mr. Murrell were supported by  
14 his objective examination findings, his review of systems, and his familiarity with  
15 Plaintiff’s medical history and recent diagnostic tests, along with his explanation of  
16 supporting diagnoses and symptoms. Tr. 29. The ALJ found Mr. Muller’s opinion  
17 inconsistent with the record as a whole prior to November 20, 2019, but “infer[d]  
18 that [Plaintiff’s] symptoms were consistent with the sedentary limitations for two  
19 months prior to the date of examination” based on “other evidence in the record  
20 [which] supports a reduction in exertional capacity in November 2019.” *Id.*

21 Plaintiff contends that the ALJ’s finding that Plaintiff’s RFC diminished  
22 from light to sedentary level exertion as of November 20, 2019 is arbitrary and not  
23 supported by substantial evidence because Plaintiff’s symptoms limited her to  
24 sedentary work throughout the relevant time period; and that “the ALJ should have  
25 called upon a medical consultant to establish when Plaintiff became limited to  
26 sedentary work.” ECF No. 24 at 6-8. Defendant contends that the record was  
27 neither ambiguous or inadequate to allow for proper evaluation of the evidence in  
28



1 this case, and the ALJ was well equipped to determine Plaintiff's disability onset  
2 date without calling a medical advisor. ECF No. 22 at 16. The Court agrees.

3 The decision to consult a medical expert is within the discretion of the ALJ.  
4 SSR 81-1p, 2018 WL 4945639, at \*1. Here, the ALJ explained he inferred the  
5 disability onset date based on treating provider Mr. Murrell's January 20, 2020  
6 opinion limiting her to sedentary exertion, along with "other evidence in the record  
7 [which] supports a reduction in exertional capacity in November 2019." Tr. 29.  
8 The ALJ explained this evidence included a telephone call with her pharmacy  
9 where she reported worsening symptoms in November 2019; evidence her blood  
10 sugar levels, as found on A1C testing, had worsened throughout 2019; and  
11 evidence from an October 2019 examination that showed continued diminished  
12 sensation to filament testing on both feet, along with her "recent diagnoses of  
13 corneal scarring and mild cataracts." Tr. 29-30 (citing Tr. 513, 529, 558). The  
14 ALJ concluded that based on this evidence it was "reasonable to infer from the  
15 progression of [Plaintiff's] symptoms and signs of neuropathy, pain, and eye  
16 impairment, that [she] was unable to safely sustain the demands of light work . . .  
17 by November 20, 2019, and that she became limited to sedentary exertion at that  
18 time." Tr. 30. Additionally, as discussed *infra*, the ALJ also found that Plaintiff  
19 was the primary caregiver of her disabled brothers until paid caregiver hours  
20 through the state increased in late 2019, which is also consistent with the onset of  
21 disability date. *See* Tr. 45-53.

22 To the extent the evidence could be interpreted differently, it is the role of  
23 the ALJ to resolve conflicts and ambiguity in the evidence. *See Morgan*, 169 F.3d  
24 at 599-600. Even if the medical opinion evidence could be interpreted more  
25 favorably to Plaintiff, if it is susceptible to more than one rational interpretation,  
26 the ALJ's ultimate conclusion must be upheld. *Burch v. Barnhart*, 400 F.3d 676,  
27 679 (9th Cir. 2005). The Court will only disturb the ALJ's findings if they are not  
28 supported by substantial evidence. *Hill v. Astrue*, 698 F.3d 1153, 1158.



1 For the reasons discussed above, the ALJ's conclusion that the medical  
2 evidence supported a progression of Plaintiff's symptoms resulting in limitation to  
3 sedentary exertion as of November 20, 2019 is supported by substantial evidence.  
4 The ALJ was within his discretion in inferring the date that the claimant first met  
5 the statutory definition of disability and Plaintiff is not entitled to remand on this  
6 issue.

7 **B. Plaintiff's Symptom Claims**

8 Plaintiff contends the ALJ erred by improperly rejecting Plaintiff's symptom  
9 testimony. ECF No. 24 at 11-16.

10 It is the province of the ALJ to make determinations regarding a claimant's  
11 subjective statements. *Andrews*, 53 F.3d at 1039. However, the ALJ's findings  
12 must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229,  
13 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an  
14 underlying medical impairment, the ALJ may not discredit testimony as to the  
15 severity of an impairment merely because it is unsupported by medical evidence.  
16 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence  
17 of malingering, the ALJ's reasons for rejecting the claimant's testimony must be  
18 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
19 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are  
20 insufficient: rather the ALJ must identify what testimony is not credible and what  
21 evidence undermines the claimant's complaints." *Lester* at 834; *Dodrill v. Shalala*,  
22 12 F.3d 915, 918 (9th Cir. 1993).

23 The ALJ concluded Plaintiff's medically determinable impairments could  
24 reasonably be expected to cause the alleged symptoms; however, Plaintiff's  
25 statements concerning the intensity, persistence, and limiting effects of those  
26 symptoms were not fully supported prior to November 20, 2019. Tr. 22.  
27  
28

1 *1. Inconsistent with Objective Medical Evidence*

2 The ALJ found that prior to the disability onset date, Plaintiff's allegations  
3 were not consistent with objective findings. Tr. 22, 23-26. An ALJ may not  
4 discredit a claimant's symptom testimony and deny benefits solely because the  
5 degree of the symptoms alleged is not supported by objective medical evidence.  
6 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Bunnell v. Sullivan*, 947  
7 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir.  
8 1989); *Burch*, 400 F.3d at 680. However, the objective medical evidence is a  
9 relevant factor, along with the medical source's information about the claimant's  
10 pain or other symptoms, in determining the severity of a claimant's symptoms and  
11 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),  
12 416.929(c)(2).

13 Here, the ALJ found the medical evidence did not fully support the level of  
14 limitations claimed prior to onset of disability. Tr. 22-26. The ALJ noted that  
15 upon exam in January 2018 Plaintiff had mild bilateral paralumbar tenderness, full  
16 range of motion in her back, some pain in her hamstrings upon flexion, 5/5 motor  
17 strength in her bilateral lower extremities, normal gait, negative straight leg raise  
18 testing, and no spinal tenderness. Tr. 23 (citing Tr. 333-36). The ALJ noted that at  
19 an intake appointment for physical therapy later in January 2018, she showed  
20 minimal restriction in lumbar motion, slight diminishment in lower-extremity  
21 motor strength, and no gait or balance abnormalities. Tr. 23 (citing Tr. 397). The  
22 ALJ noted at a rheumatology visit in January 2018, her provider found bilateral  
23 mild nodular hand osteoarthritis without acute swelling, synovitis, or evidence of  
24 rheumatoid changes; she had mild discomfort with shoulder range of motion, and  
25 no swelling in her elbows, knees, ankles or toes. Tr. 23 (citing Tr. 418-20). The  
26 ALJ explained that exam at that time showed "slightly tender fibromyalgia tender  
27 points . . . but no focal neurological deficits." *Id.* The ALJ also noted at a  
28 February 2018 rheumatology follow up Plaintiff's lab results were negative for

1 rheumatoid factor and other autoimmune factors, she had 10 of 18 fibromyalgia  
2 tender points upon exam, and her provider determined that her clinical presentation  
3 was most consistent with fibromyalgia and osteoarthritis. Tr. 23 (citing Tr. 423-  
4 25).

5 The ALJ noted that a March 2018 a diabetic foot exam showed decreased  
6 sensation to monofilament, but normal pulses and nails, and no deformity or  
7 edema; she was diagnosed with uncontrolled diabetes with diabetic  
8 mononeuropathy, and subsequent lab results showed A1C of 9.2. Tr. 23 (citing Tr.  
9 451-52, 458). The ALJ noted that upon consultative exam in in April 2018  
10 Plaintiff exhibited some limitation in range of motion in her back, shoulders, and  
11 knees but otherwise normal range of motion in her extremities. Tr. 23 (citing Tr.  
12 442-47). She had mildly decreased 4+/5 grip strength on the left, but normal grip  
13 on the right. Tr. 23; *see* Tr. 445. The ALJ noted the consultative examiner's  
14 explanation that while Plaintiff reported some discomfort in the paralumbar  
15 muscles with the maneuver, straight leg raise testing did not produce true sciatic  
16 signs. *Id.* The ALJ noted physical exam at that time was "otherwise largely  
17 normal," and also that x-rays from April 2018 showed multilevel moderate  
18 degenerative disc disease without spondylosis or spondylolisthesis. Tr. 24 (citing  
19 Tr. 442-47, 473-75).

20 The ALJ noted that a December 2018 foot exam revealed diminished and  
21 absent left vascular and dorsalis pulses, normal pulses on the right, cold feet,  
22 bilateral fifth-toe tenderness, and absent sensation to filament bilaterally;  
23 Plaintiff's gait was normal. Tr. 24 (citing Tr. 493). The ALJ also noted Plaintiff's  
24 report at that appointment that she had not been consistently taking her injected  
25 diabetic medications, and that she felt overwhelmed by pain and the demands of  
26 caring for her brother. Tr. 24; *see* Tr. 491. At that appointment her provider also  
27 reported Plaintiff had stopped monitoring her glucose, was taking insulin  
28 infrequently, and was not taking Humalog at all. Tr. 491. The ALJ also noted,

1 however, that another diabetic foot exam within the same month was largely  
2 normal, including intact protective threshold with monofilament testing, warm skin  
3 temperature, intact foot strength, and no edema. Tr. 24 (citing Tr. 719).

4 At a January 2019 exam to establish care with Mr. Murrell, PA-C, Plaintiff  
5 exhibited reduced deep-tendon reflexes in the bilateral lower extremities and  
6 decreased range of motion in the right shoulder compared with left, but she also  
7 had stable vital signs, no low-back tenderness, negative straight leg raise, and no  
8 neurological deficits. Tr. 24 (citing Tr. 681). Upon follow up exam in April 2019,  
9 Mr. Murrell indicated Plaintiff's back symptoms remained stable; and in July 2019  
10 he noted reduced bilateral deep-tendon reflexes but an otherwise normal physical  
11 exam. Tr. 24 (citing Tr. 608 659). Her diabetes remained uncontrolled during the  
12 period at issue, and the ALJ noted her hemoglobin A1C increased during this time  
13 from 8.5 in January 2019 to 10.2 on October 2019. Tr. 24 (citing Tr. 369, 513).

14 The ALJ concluded that while records show uncontrolled diabetes and  
15 physical complaints, with some deficits in light-touch sensation and reduced deep  
16 tendon reflexes during the period at issue, "[Plaintiff] otherwise demonstrated  
17 generally normal musculoskeletal and neurological signs in her medical visits  
18 through October 2019." Tr. 24. The ALJ noted, for example, providers found her  
19 alert and oriented with no neurological deficits, no edema, and normal back exams  
20 "without tenderness or straight-leg signs." Tr. 24-25 (citing e.g., Tr. 428, 451-52,  
21 493, 529, 608, 649, 659, 681).

22 As for Plaintiff's mental health symptoms, the ALJ noted that upon mental  
23 status exam in July 2018 she appeared restless with mildly nervous affect, she was  
24 tangential in her speaking but able to be redirected, she had some deficits in  
25 memory and poor to fair insight and judgment, but that the examination was  
26 otherwise largely normal. Tr. 25 (citing Tr. 476-83; *see* Tr. 479-80). The ALJ  
27 noted the consultative examiner's observation that Plaintiff was cooperative and  
28 friendly, and mental status findings including that her speech was normal in rate

1 and tone, she was fully oriented with normal eye contact, she had normal  
2 immediate and recent memory, and she could follow a three-step command. *Id.*  
3 On the Trail Making Tests, the ALJ noted that Trails A testing was unimpaired  
4 while the more complex Trails B test showed moderate impairment; and that  
5 memory testing showed borderline visual and immediate memory, low average  
6 visual working and delayed memory, and average auditory memory. Tr. 25; *see*  
7 Tr. 480-83. The ALJ noted the consultative examiner gave a fair prognosis for  
8 improvement with six-months engagement in treatment. Tr. 25. The ALJ also  
9 explained mental status findings by other providers were generally normal,  
10 including findings that she was cooperative, had normal mood and affect, intact  
11 memory, and normal judgement. Tr. 26 (citing e.g., Tr. 428, 452, 649).

12 The Court must consider the ALJ's decision in the context of the "entire  
13 record as a whole," but if the "evidence is susceptible to more than one rational  
14 interpretation, the ALJ's decision should be upheld." *Ryan v. Comm'r of Soc. Sec.*,  
15 528 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation marks omitted). Further,  
16 where the ALJ's interpretation of the record is reasonable, as it is here, it should  
17 not be second-guessed. *Rollins*, 261 F.3d at 857. The ALJ reasonably concluded  
18 that the objective medical evidence did not support the level of impairment alleged  
19 by Plaintiff. This was a clear and convincing reason, when combined with the  
20 other reasons offered, to discount Plaintiff's symptom reports prior to the disability  
21 onset date.

## 22 2. Conservative Treatment

23 The ALJ discounted Plaintiff's symptom complaints in part because  
24 treatment was conservative. Tr. 24. Evidence of conservative treatment is  
25 sufficient to discount a claimant's testimony regarding the severity of an  
26 impairment. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008)  
27 (holding the ALJ permissibly inferred that the claimant's "pain was not as all-  
28 disabling as he reported in light of the fact that he did not seek an aggressive

1 treatment program” and “responded favorably to conservative treatment including  
2 physical therapy and the use of anti-inflammatory medication, a transcutaneous  
3 electrical nerve stimulation unit, and a lumbosacral corset”).

4 Here, the ALJ noted treatment recommendations have been conservative,  
5 including physical therapy and medication. Tr. 23-24. The ALJ explained in  
6 January 2019 Mr. Murrell recommended Plaintiff continue previously prescribed  
7 treatment for diabetes and fibromyalgia; and at an appointment in April 2019, he  
8 noted her back symptoms were stable and indicated she should continue  
9 conservative care. Tr. 24 (citing Tr. 659, 681). The ALJ noted in July 2019 Mr.  
10 Murrell continued to recommend conservative treatment for back pain, including  
11 stretching exercises and physical therapy. Tr. 24 (citing Tr. 608). Records from  
12 January 2018 show her rheumatologist recommended improving sleep quality, and  
13 told Plaintiff that regular exercise, healthy eating, and stress reduction “will be  
14 extremely helpful” for her symptoms. Tr. 425.

15 The ALJ reasonably discounted Plaintiff’s symptom complaints in part  
16 because treatment was conservative, and this was a clear and convincing reason to  
17 discount Plaintiff’s symptom reports prior to onset of disability.

### 18 *3. Failure to Follow Treatment Recommendations*

19 The ALJ discounted Plaintiff’s symptom complaints because she failed to  
20 follow or comply with treatment recommendations. Tr. 23-24. An unexplained, or  
21 inadequately explained, failure to seek treatment or follow a prescribed course of  
22 treatment may be considered when evaluating the claimant’s subjective symptoms.  
23 *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). And evidence of a claimant’s  
24 self-limitation and lack of motivation to seek treatment are appropriate  
25 considerations in determining the credibility of a claimant’s subjective symptom  
26 reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001). When there  
27 is no evidence suggesting that the failure to seek or participate in treatment is  
28 attributable to a mental impairment rather than a personal preference, it is

1 reasonable for the ALJ to conclude that the level or frequency of treatment is  
2 inconsistent with the alleged severity of complaints. *Molina v. Astrue*, 674 F.3d  
3 1104, 1113-14 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §  
4 404.1520(a).

5 Here, the ALJ explained Plaintiff was referred for physical therapy in  
6 January 2018, but only went to one appointment. Tr. 23; *see* Tr. 401. The ALJ  
7 noted that in January 2018 her provider prescribed a transition from Effexor to  
8 Cymbalta to help control her fibromyalgia symptoms, but at a follow up visit  
9 Plaintiff reported she declined to start Cymbalta due to concern about side effects.  
10 Tr. 23 (citing Tr. 423-25, 435). The ALJ also noted while Plaintiff had an  
11 abnormal foot exam in December 2018, she also reported she had not been  
12 consistently taking her diabetes medications. Tr. 24; *see* Tr. 491. Records also  
13 show she reported she had stopped monitoring her glucose several months prior  
14 and was taking insulin infrequently. Tr. 491. Her provider noted Plaintiff had not  
15 been to her PCP recently, had not seen rheumatology for her fibromyalgia, and that  
16 “she feels awful today and she knows this is because she had not been taking care  
17 of her diabetes.” *Id.* At the hearing, Plaintiff acknowledged she has not always  
18 been compliant with diabetes medication during the period at issue. Tr. 59. She  
19 testified that she did not check her blood sugar and took diabetes medications  
20 irregularly. Tr. 61-62. She testified she managed her diabetes based on how she  
21 felt, although she acknowledged this was not working well, as her A1C was  
22 recently up to 10. Tr. 64. While records show mental health symptoms, records  
23 from May and November 2019, for example, show she declined referral to a  
24 behavioral specialist to talk about stress or depression. Tr. 513, 649. At the 2018  
25 consultative examination, she reported she had never received mental health  
26 counseling. Tr. 477.



1 The ALJ reasonably discounted Plaintiff's symptom complaints because she  
2 failed to follow or comply with treatment recommendations. This was a clear and  
3 convincing reason to discount Plaintiff's symptom reports.

4 *4. Activities*

5 The ALJ concluded that Plaintiff's activities were inconsistent with her  
6 allegations. Tr. 26. The ALJ may consider a claimant's activities that undermine  
7 reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial  
8 part of the day engaged in pursuits involving the performance of exertional or non-  
9 exertional functions, the ALJ may find these activities inconsistent with the  
10 reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113.  
11 "While a claimant need not vegetate in a dark room in order to be eligible for  
12 benefits, the ALJ may discount a claimant's symptom claims when the claimant  
13 reports participation in everyday activities indicating capacities that are  
14 transferable to a work setting" or when activities "contradict claims of a totally  
15 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

16 Here, the ALJ found evidence of "activities and abilities" inconsistent with  
17 Plaintiff's allegations prior to onset of disability. Tr. 26. The ALJ explained, "as  
18 referenced throughout the record and her testimony, [Plaintiff] has been a longtime  
19 caregiver for her adult brothers with Fragile-X syndrome." *Id.* The ALJ noted  
20 Plaintiff's testimony that her brother's required constant redirection to attend to  
21 tasks and that she had to keep them away from hazards. Tr. 26; *see* Tr. 50-51. The  
22 ALJ also noted her report in July 2018 that she was caring for her father and her  
23 brothers, and that at that time she described a daily routine of cleaning, cooking,  
24 paying bills, and going shopping; she indicated she could wash dishes, do laundry,  
25 vacuum and dust, and that she was able to finish such tasks in a reasonable amount  
26 of time. Tr. 26 (citing Tr. 478).

27 The ALJ also noted Plaintiff's testimony that she became progressively less  
28 able to care for her brothers during the period at issue, and that she had obtained

1 in-home caregivers for them. Tr. 26. The ALJ found, however, that “for much of  
2 the period at issue, [Plaintiff] was the one primarily in charge of the care and safety  
3 of her brothers, including overseeing their medication and taking them to  
4 appointments.” *Id.* At the hearing, Plaintiff testified that paid caretaker hours for  
5 one of her brothers increased in October 2019, but that up until that point “I was  
6 doing it all. It took a huge toll on me.” Tr. 45, 49. She testified that caregiver  
7 hours for her other brother were in the process of being increased by the state, and  
8 that before the caretaker hours increased in late 2019, she was preparing meals,  
9 helping her brothers bathe, and was responsible for all house chores. Tr. 50, 53.

10 While Plaintiff offers a different interpretation of the evidence, the ALJ  
11 reasonably found Plaintiff’s activities were inconsistent with her claims of  
12 disabling limitations prior to the disability onset date. This was a clear and  
13 convincing reason, when combined with the other reasons offered, to discount  
14 Plaintiff’s symptom reports.

15 Plaintiff is not entitled to remand on this issue.

### 16 **C. Sit/Stand Option**

17 Plaintiff contends the ALJ erred by failing to clarify what degree of sitting  
18 and standing the sit/stand option entailed. ECF No. 24 at 8-11. “In cases of  
19 unusual limitation of ability to sit or stand, a [vocational specialist] should be  
20 consulted to clarify the implications for the occupational base.” SSR 83-12, 1983  
21 WL 31253, at \*4 (1983).

22 Here, the ALJ found that prior to November 20, 2019, Plaintiff could  
23 perform light work with limitations including a “sit/stand option in the workplace.”  
24 Tr. 21. Plaintiff contends that the ALJ erred by failing to more clearly set out what  
25 the sit/stand limitation entailed for the period prior to November 20, 2019. ECF  
26 No. 24 at 9-10. Defendant contends that the limitation to a sit/stand option in the  
27 workplace is not ambiguous, and that as the ALJ made alternate step five findings,  
28

1 any error in the ALJ's step-four finding would be harmless. ECF No. 33 at 18-19.  
2 The Court agrees.

3 First, while Plaintiff contends the ALJ must include what "degree of sitting  
4 and standing this limitation entailed," the Court finds that on this record such  
5 limitation may be reasonably interpreted as sitting or standing "at-will." See  
6 *Buckner-Larkin v. Astrue*, 450 Fed. Appx. 626, 627 (9th Cir. 2011) (noting that a  
7 "sit-stand option . . . is most reasonably interpreted as sitting or standing 'at-  
8 will'"); *Donald H. v. Comm'r of Soc. Sec.*, 2020 WL 6886252, at\*2 (W.D. Wash,  
9 Nov. 24, 2020) ("the ALJ's RFC . . . is not impermissibly vague as to the meaning  
10 of 'sit-stand option,' given the plain meaning of the words and cases finding the  
11 'sit-stand option' refers to an option to sit or stand at will").

12 At the hearing, the vocational expert (hereinafter VE) testified that a person  
13 limited to light work with the limitations in the ALJ's hypothetical, including the  
14 sit stand option, could perform Plaintiff's past work as a cashier II; the ALJ  
15 therefore determined, based on the VE's testimony, that prior to November 20,  
16 2019 Plaintiff could perform her past relevant work and this occupation would  
17 "generally permit the requisite sit/stand option." Tr. 30. The ALJ also made  
18 alternate step five findings, based on VE testimony, finding there were other jobs  
19 existing in significant numbers in the national economy that Plaintiff could have  
20 performed prior to November 20, 2019. Tr. 31. The ALJ explained that as  
21 Plaintiff's limitation to light work was "impeded by additional limitations," he  
22 asked the VE whether jobs existed in the national economy for an individual with  
23 Plaintiff's age, education, work experience, and RFC. *Id.* The VE testified that  
24 Plaintiff could perform three representative occupations, noting that the job  
25 numbers would be eroded by 25 percent due to the sit/stand option. *Id.* The ALJ  
26 confirmed with the VE that any testimony inconsistent with or not found in the  
27 DOT, such as the sit/stand option, was based on the VE's professional experience.  
28 Tr. 30, 82.

1 Defendant also points out that the VE did not question the sit/stand  
2 limitation when testifying that the jobs he gave “allow for the change of position  
3 without requiring an accommodation” in response to the ALJ’s hypothetical. ECF  
4 No. 33 at 20 (citing Tr. 80-81; *see* Tr. 79-82). While Plaintiff posed her own, more  
5 restrictive hypothetical(s) at the hearing, the ALJ “is free to accept or reject  
6 restrictions in a hypothetical question that are not supported by substantial  
7 evidence.” *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). A claimant  
8 fails to establish that a step five determination is flawed by simply restating an  
9 argument that the ALJ improperly discounted certain evidence, when the record  
10 demonstrates the evidence was properly rejected. *Stubbs-Danielson v. Astrue*, 539  
11 F.3d 1169, 1175-76.

12 For reasons discussed throughout this decision, the ALJ’s consideration of  
13 the evidence is legally sufficient and supported by substantial evidence. The ALJ  
14 has the discretion to evaluate and weigh the evidence and the Plaintiff’s alternative  
15 interpretation of the evidence does not undermine the ALJ’s analysis. The ALJ did  
16 not err in assessing the RFC, including a sit/stand option, or finding Plaintiff  
17 capable of performing work existing in the national economy, and the RFC  
18 adequately addresses the medical evidence in this record. Plaintiff is not entitled to  
19 remand on these grounds.

## 20 CONCLUSION

21 Having reviewed the record and the ALJ’s findings, the Court finds the  
22 ALJ’s decision is supported by substantial evidence and free of legal error and is  
23 affirmed. Therefore, **IT IS HEREBY ORDERED:**

24 1. Defendant’s Motion for Summary Judgment, **ECF No. 33**, is  
25 **GRANTED.**

26 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 24**, is **DENIED.**  
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1 The District Court Executive is directed to file this Order and provide a copy  
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
3 **and the file shall be CLOSED.**

4 **IT IS SO ORDERED.**

5  
6 DATED January 12, 2023.



*Alexander C. Ekstrom*

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE

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